Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOAN BRAY,

Petitioner,

vs.

SHRINK MISSOURI GOVERNMENT PAC, a political action committee, and ZEV DAVID FREDMAN

-and-

RICHARD ADAMS, PATRICIA FLOOD, ROBERT GARDNER, DONALD GANN, MICHAEL GREENWELL, and ELAINE SPIELBUSCH, members of the Missouri Ethics Commission; JEREMIAH W. NIXON, Attorney General of Missouri; and ROBERT P. McCULLOUGH, St. Louis County Prosecuting Attorney,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment as construed in *Buckley v. Valeo*, 424 U.S. 1 (1976), which upheld the $1,000 federal campaign contribution limits still in effect today, a state may impose contribution limits for state and local candidates ranging up to $1,075.

2. Whether the analytic structure undergirding *Buckley v. Valeo*, 424 U.S. 1 (1976), has become so confused and unwieldy as to call for reconsideration of the relationship between the First Amendment and content-neutral efforts to regulate the financing of political campaigns.

3. Whether a federal court errs in striking down as unconstitutional, without trial, a state's campaign contribution limits, where the legislature enacted the limits after hearings and deliberation in order to balance the need to raise money to run effective campaigns with the potential and appearance that contributions were buying influence with legislators, and where 74% of the electorate manifested concern over the appearance of corruption in its approval of an initiative that established even lower contribution limits than those at issue here.

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption. Pursuant to Fed. R. App. P. 43(a)(1), Donald Gann and Michael Greenwell, newly appointed members of the Missouri Ethics Commission, are substituted for their predecessors, Ervin Harder and John Howald.

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APPENDIX

Petitioner Bray adopts by reference and with permission the Appendix contained in the Petition for Writ of Certiorari filed by petitioners Jeremiah W.(Jay) Nixon, Richard Adams, Patricia Flood, Robert Gardner, Donald Gann, Michael Greenwell, Elaine Spielbusch, and Robert McCulloch. *See Nixon v. Shrink Missouri Government PAC,* Petition for Cert. (filed December 14, 1998).

Petitioner Joan Bray, a Missouri State Representative, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, filed November 30, 1998, has not yet been reported (Appendix ("App.") 1a-19a).[2] The court of appeals' order, dated July 23, 1998, entering an injunction pending appeal is reported at 151 F.3d 763 (8th Cir. 1998) (App. 20a-23a). The opinion of the district court, granting summary judgment to the State[3], dated May 12, 1998, is reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998). (App. 24a-41a).

STATEMENT OF JURISDICTION

The Eighth Circuit's opinion was entered on November 30, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

1. The Eighth Circuit granted Representative Bray's motion to intervene on August 3, 1998.

2. Petitioner Bray adopts by reference and with permission the Appendix contained in the Petition for Writ of Certiorari filed by petitioners Jeremiah W.(Jay) Nixon, Richard Adams, Patricia Flood, Robert Gardner, Donald Gann, Michael Greenwell, Elaine Spielbusch, and Robert McCulloch. *See Nixon v. Shrink Missouri Government PAC*, Petition for Cert. (filed December 14, 1998).

3. The defendants in this action below, members of the Missouri Ethics Commission, the Missouri Attorney General, and the Prosecuting Attorney for St. Louis County are referred to as the "state" throughout the petition.

the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

MISSOURI STAT. § 130.032

1. [T]he amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed the following:

(1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, one thousand dollars;

(2) To elect an individual to the office of state senator, five hundred dollars;

(3) To elect an individual to the office of state representative, two hundred fifty dollars;

(4) To elect an individual to any other office, including judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is under one hundred thousand, two hundred fifty dollars;

(5) To elect an individual to any other office, including judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least one hundred thousand but less than two hundred fifty thousand, five hundred dollars; and

(6) To elect an individual to any other office, including judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least two hundred fifty thousand, one thousand dollars.

2. For purposes of this subsection "base year amount" shall be the contribution limits prescribed in this section on January 1, 1995. Such limits shall be increased on the first day of January in

each even-numbered year by multiplying the base year amount by the cumulative consumer price index, as defined in section 104.010, and rounded to the nearest twenty-five-dollar amount, for all years since January 1, 1995.

3. Candidate committees, exploratory committees, campaign committees and continuing committees, other than those continuing committees which are political party committees, shall be subject to the limits prescribed in subsection 1 of this section. The provisions of this subsection shall not limit the amount of contributions which may be accumulated by a candidate committee and used for expenditures to further the nomination or election of the candidate who controls such candidate committee, except as provided in section 130.052.

* * *

7. Any committee which accepts or gives contributions other those allowed shall be subject to a surcharge of one thousand dollars plus an amount equal to the contribution per nonallowable contribution, to be paid to the ethics commission and which shall be transferred to the director of revenue, upon notification of such nonallowable contribution by the ethics commission, and after the candidate has ten business days after receipt of notice to return the contribution to the contributor. The candidate and the candidate committee treasurer or deputy treasurer owing a surcharge shall be personally liable for the payment of the surcharge or may pay such surcharge only from campaign funds existing on the date of receipt of notice. Such surcharge shall constitute a debt to the state enforceable under, but not limited to, the provisions of chapter 143.

STATEMENT OF THE CASE

For the first time in the 22 years since *Buckley v. Valeo,* 424 U.S. 1 (1976), was decided, this Court is presented with a decision invalidating a campaign contribution limit higher than the $1,000 limit upheld in *Buckley* and still in effect today for all federal

elections. By summarily striking a contribution limit of $1,075, the Eighth Circuit has put into question the constitutionality of the $1,000 campaign contribution limits contained in the Federal Election Campaign Act, 2 U.S.C. § 441a, as well as the limits in most states.[4] Thus, the decision below raises issues of profound importance to the coherent functioning of the electoral process by throwing into uncertainty the basic standard by which many campaign finance laws were drafted.

This case demonstrates the need for clarification and, perhaps, reconsideration of the analytic structure adopted by the Court in *Buckley* to govern the sensitive relationship between the First Amendment and efforts to regulate the financing of political campaigns. In the court below, three distinguished appellate judges, confronted by an uncomplicated case that appears to be squarely governed by this Court's holding in *Buckley,* reached three very different results. Judge John R. Gibson, in dissent, found that Missouri's effort to impose a ceiling of $1,075 on campaign contributions to candidates for statewide office was governed by this Court's decision in *Buckley* upholding a limit of $1,000 on contributions to Presidential and other federal campaigns. Accordingly, he voted to affirm the judgment of the district court upholding the constitutionality of the contribution limits. (App. 10a) (Gibson, J., dissenting).

Chief Judge Bowman, joined by Judge Ross, ruled that, under *Buckley*, Missouri was obliged to provide "demonstrable evidence" of "genuine problems" caused by large campaign contributions before imposing a limit on the size of campaign contributions. (App. 5a). The fact that an appearance of corruption existed in 1972 in connection with federal campaigns did not, ruled the panel majority, provide any justification for contemporary regulatory activity by Missouri. (App. 6a). Evidence that the legislative

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4. Thirty-five states and many cities have enacted contribution limits near or below the federal level. The petition for writ of certiorari submitted by the state summarizes these statutes and their subsequent history. (App. 42a-44a) (listing state and city contribution limits).

committee that drafted the limits viewed them necessary to combat "the appearance of buying votes" was rejected by the panel majority as not even establishing a material question of fact on the issue of the appearance of corruption. (App. 6a-7a). Accordingly, the panel majority reversed the district court and granted summary judgment for plaintiffs, invalidating the contribution limits. (App. 9a).

Judge Ross refused, however, to join the portion of Chief Judge Bowman's decision in which he found that inflation had eroded the real dollar value of the $1,000 federal contribution limits upheld in *Buckley*. (App. 9a-10a) (Ross, J., concurring).

It is no coincidence that three distinguished appellate judges, confronted by a case governed by a settled point of law that appears to have been resolved by the Court's decision in *Buckley*, vigorously disagree about what *Buckley* requires. The sheer length and complexity of the *Buckley* opinion; its ambiguous treatment of important issues such as the allocation and size of the burdens of justification; its unrelenting equation of speech and money; its highly controversial distinction between contributions and expenditures; its ambivalent treatment of the government's important interest in promoting political equality; and its highly checkered history as an effective precedent have led to massive confusion and uncertainty in the courts, the legislatures, the administrative agencies, the political world, and the citizenry. Unless this Court clarifies the First Amendment analysis governing efforts to regulate campaign financing, confusion will continue to be the principal attribute of the law of campaign financing.

The decision of the panel majority below, granting summary judgment to Shrink Missouri Government PAC, decides a crucial question of First Amendment law — the constitutionality of $1,000 limits on campaign contributions — in a way that appears to be in direct conflict with this Court's decision in *Buckley*, and with the law of one other circuit. *Compare* App. 1a-19 *with Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir), *cert. denied*, 118 S. Ct. 162 (1997). As the district court and the dissent below

recognized, the panel's decision is nothing less than an attempt to overturn *Buckley* from below. (App. 34a) (district court opinion) ("Plaintiffs appear to be implying that the Supreme Court's decision in *Buckley* no longer sits on a firm foundation."); (App. 19a) (Gibson, J. dissenting) ("Perhaps members of the Court quarrel . . . with *Buckley* itself . . . ."). This petition respectfully requests the Court to exercise its certiorari jurisdiction in order to clarify, reconsider, or reaffirm *Buckley v. Valeo*. Indeed, in view of the conflict between the Eighth Circuit's decision and this Court's specific holding in *Buckley v. Valeo*, the Court may wish to consider summary reversal.

A. Statutory Background

Until 1994, Missouri's campaign finance laws permitted unlimited contributions to candidates for state and local office. During that time, very large contributions were not only permitted, they were made. *See Carver v. Nixon*, 72 F.3d 633, 642 (8th Cir. 1995) (citing $420,000 in contributions from one PAC to several races in one area of the state), *cert. denied*, 518 U.S. 1033 (1996); *see also* (App. 31a) (district court opinion) (citing newspaper stories and editorials about contributions of $40,000 and $20,000).

In July 1994, following hearings and debate, the legislature enacted Senate Bill 650, which included contribution limits of $1,000 per election for statewide candidates, $500 per election for state senators, and $250 per election for state representatives. *See* Mo. Ann. Stat. §§ 130.032.1, 130.032.3 (West 1998); *see also Carver*, 72 F.3d at 645 n.18 (noting deliberative process). The statute also required that the limits be adjusted every two years for inflation. *See* Mo. Ann. Stat. § 130.032.2.

Considering these limits too high, that same year the citizens of Missouri approved an initiative, by an overwhelming 74 percent of the vote, that set contribution limits ranging from $100 to $300 per election cycle. *See Carver v. Nixon,* 72 F 3d at 634. The Eighth Circuit invalidated those limits, reinstating the limits from Senate Bill 650. *Id.* at 633.

Missouri held its 1996 elections, including those for several statewide offices, under the contribution limits at issue in this case. (App. 36a-37a) (district court opinion) (describing ability of candidates to raise money under limits). They were in effect for the 1998 state elections until they were enjoined by the Eighth Circuit on July 23, 1998. (App. 23a). The current limit for statewide candidates, adjusted for inflation, is $1,075. (App. 3a).

B. Proceedings Below

1. *District Court*

Shrink Missouri Government PAC and Zev David Fredman filed this action challenging the constitutionality of Missouri's contribution limits. Following cross-motions for summary judgment filed barely one month after the complaint, the district court entered summary judgment for the state.

In its decision, the district court determined that the state had established its interests in combating corruption or the appearance of corruption. Its determination was based on the affidavit from the state senator who co-chaired the joint legislative committee on campaign finance reform and had spent more than 35 years in the Missouri legislature.[5] (App. 31a). The senator's affidavit detailed that the committee had held hearings, heard "a broad spectrum of opinions," and discussed "at length" the level at which contributions present the potential to become unduly influential. The affidavit explained that it was the "consensus of the committee . . . that the limits set forth in the bill balanced the need to run an effective campaign with the appearance of buying votes."[6] The court noted that the senator viewed contributions in excess of the

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5. The senator's affidavit provided the only description of the committee's deliberative process because the state does not collect or perserve legislative history. (App. 31a).

6. The affidavit of Senator Goode was submitted in support of the state's summary judgment motion and was included in the joint record on appeal.

limits as having "the appearance of buying votes as well as the real potential to buy votes." (App. 31a) (quoting affidavit). The district court found support for the senator's statements in numerous press accounts from the period in which the contribution limits were enacted (App. 31a), and in the overwhelming public support for Proposition A, which enacted lower contribution limits and passed shortly after the legislature approved the limits here (App. 32a).

The court also rejected Shrink Missouri Government PAC's arguments that the limits were not "narrowly tailored." (App. 35a). Relying on the state's evidence that candidates could raise enough money for campaigns, the court found that the $1,075 limits were not different in kind from *Buckley*'s $1,000 limits, despite the effect of inflation. (App. 37a). Recognizing the variety of factors to be considered in setting contribution limits — from local income to broad inflationary factors (App. 39a-40a) — the court stated, "this analysis illustrates what the *Buckley* Court meant when it said that a judge has 'no scalpel to probe,' whether a $1,000 or $2,000" limit is more appropriate. (App. 41a) (quoting *Buckley*, 424 U.S. at 30).

Noting that Shrink Missouri Government PAC's arguments suggested that *Buckley* was not good law, the court declined to strike Missouri's limits. "[T]o hold that in the context of contribution limits on state elections, the monetary limits approved of in *Buckley* are invalid would, in the Court's view, constitute an indirect — but still improper — overruling of that decision." (App. 39a).

2. *Court of Appeals*

On appeal, a splintered panel of the Eighth Circuit reversed, holding that Missouri's contribution limits ranging up to $1,075 were unconstitutional as matter of law. (App. 9a). The dissent stated that this holding "disregards the inescapable similarity between" Missouri's contribution limits and those upheld in *Buckley* (App. 18a), and stated that "members of the Court quarrel

not only with the contribution limits at issue . . . but with *Buckley* itself," (App. 19a).

The court of appeals held that as a matter of law Missouri failed to show, and, by implication, could not show, that large contributions — those greater than $1,075 for statewide races — gave rise to corruption or the appearance of corruption. (App. 7a). The court of appeals demanded "some demonstrable evidence that there were genuine problems" resulting from contributions larger than the limits, (App. 5a) (citing *Russell v. Burris*, 146 F.3d 563, 568 (8th Cir.), *cert. denied*, 67 U.S.L.W. 3177 (U.S. Nov. 16, 1998) (No. 98-397)), yet rejected the uncontroverted evidence of the public perception of corruption presented to the district court. In the dissent's view: "In rejecting the state's evidence, the Court sidesteps binding Supreme Court precedent." (App. 18a) (Gibson, J., dissenting).

The court also addressed whether the contribution limits were narrowly tailored. Two of the judges on the panel held that the $1,075 limits did not differ in kind from the limits upheld in *Buckley*. (App. 10a) (Ross, J., concurring); (App. 13a) (Gibson, J., dissenting).[7] In contrast, Judge Bowman concluded that the $1,075 limit here was "different in kind" from *Buckley*'s $1,000 limit because under Eighth Circuit precedent inflation had eroded the similarity between the *Buckley*-approved limits and the limits here. (App. 8a-9a).

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7. Judge Ross joined the dissent in concluding that the limits were not different in kind from those approved in *Buckley*, but sided with the majority to hold that the state had failed to prove its compelling interest of preventing the reality or appearance of corruption.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S SUMMARY INVALIDATION OF MISSOURI'S CAMPAIGN CONTRIBUTION LIMITS RANGING UP TO $1,075 IS A FLAT REJECTION OF THIS COURT'S DECISION IN *BUCKLEY v. VALEO* APPROVING THE FEDERAL $1,000 LIMITS AND HOLDING THAT COMBATING THE PERCEPTION OF CORRUPTION IS A SUFFICIENT GOVERNMENTAL INTEREST FOR IMPOSING CONTRIBUTION LIMITS.

In *Buckley*, this Court set forth two important governmental interests that will support limits on campaign contributions — (1) combating corruption *and* (2) curtailing the *appearance* of corruption. *See Buckley*, 424 U.S. at 25. Reiterating the difficulty of proving actual corruption, the *Buckley* Court turned again and again to the perception of corruption "inherent in a regime of large individual financial contributions" to uphold the $1,000 limits in FECA. *Id.* at 27; *see, e.g., id.* at 28, 30. The court of appeals, here, however, insisted that absent proof of actual corruption the government has no important interest in limiting campaign contributions. This holding is a direct and insupportable rejection of *Buckley*.

There is no question that this Court recognizes that a government attempt to ameliorate perceived corruption is a compelling interest supporting limits on campaign contributions. In *Buckley*, the Court repeatedly stated that the "primary" interest served by contribution limits was the "prevention of corruption and the *appearance* of corruption spawned by the real or *imagined* coercive influence of large financial contributions." *Id.* at 25 (emphasis added); *see id.* at 28 (contribution limits are necessary "to deal with the reality or appearance of corruption inherent in a system" of large contributions); *see also Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) (plurality) (limits on contributions serve a " 'compelling' government interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption"). This

recognition of a government interest growing out of an "imagined coercive influence" underscores the Court's conclusion that there is an important interest in maintaining confidence in representative government even in the absence of actual corruption.

After recognizing that actual corruption can be very difficult to prove,[8] the Court stated:

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse *inherent* in a regime of large individual financial contributions.

Id. at 27 (emphasis added). The Court did not require that the public know about specific instances of *quid pro quo* corruption in order to create "a perception of corruption" giving rise to a compelling interest in imposing contribution limits. Instead, the Court recognized that the public would *assume* that there was abuse in a system that allows large contributions and that this assumption threatened the integrity of the electoral process even in the absence of proof of actual corruption.

The Eighth Circuit rejects that aspect of *Buckley* by demanding that Missouri produce some "demonstrable evidence" that there were "genuine problems" that resulted from large contributions. (App. 5a) (citing *Russell*, 146 F.3d at 568, 569). Moreover, even under that standard, the court will not allow the state to establish the appearance of corruption. Despite a sworn statement from the state senator who co-chaired the committee on campaign finance reform — in which he described the legislative process that resulted in the limits and the consensus of the committee that contributions

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8. The Court noted that "the scope of such pernicious practices can never be reliably ascertained" and cited evidence from the 1972 election to state that the "problem is not an illusory one." *Id.* at 27.

in excess of the limits created an appearance of corruption[9]— the Eighth Circuit held that the state had failed to demonstrate a genuine issue of material fact regarding the appearance of corruption.[10] The Court did not even address the overwhelming support that Missouri voters gave to the much lower contribution limits in Proposition A; support which the district court considered evidence of a public perception of a problem. In short — and remarkably — the Eighth Circuit held that uncontroverted testimony from a perennial candidate and long-time state legislator that large contributions created a perception of corruption, evidence of newspaper articles and editorials from around the state reporting on the dangers of large contributions, and an overwhelming public vote in favor of an initiative with even lower contribution limits than those challenged here are not sufficient evidence of a public perception of corruption for the State to survive summary judgment.

In fact, this evidence is no less detailed and weighty than that relied on by the *Buckley* Court when it found in favor of the government on the merits. As the dissent noted below, the Eighth Circuit's treatment of the evidence here cannot be reconciled with *Buckley*, "which cited no actual evidence that large contributions might give rise to the appearance of political corruption and which deferred to what Congress could have reasonably concluded." (App. 17a) (Gibson, J., dissenting) (citing *Buckley*, 424 U.S. at 27, 28, 30).[11]

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9. The senator's affidavit testimony, along with several newspaper articles discussing large contributions, is cited in the district court opinion. (App. 31a-32a) (district court opinion).

10. The Eighth Circuit demonstrates its hostility to this evidence by weighing and criticizing the affidavit at issue, describing it as "conclusory and self serving . . . There is no way for us to tell whether this single legislator's perception of corruption is the 'public perception' . . ." (App. 7a) (quoting *Russell*, 146 F.3d at 569).

11. Instead, the Eighth Circuit held that it would not "extrapolate" from the evidence of corruption in *Buckley* to infer that Missouri state candidates are corrupt or appear corrupt. *Id.* (App. 6a).

The Eighth Circuit's outright refusal to follow this core holding in *Buckley* throws into question almost every contribution limit in the nation — including the federal limits — and cries out for this Court's attention. Indeed, in light of this direct conflict, the Court may wish to consider summary reversal.

II. THE LOWER COURTS ARE DIVIDED ON HOW TO APPLY *BUCKLEY* IN EVALUATING CONTRIBUTION LIMITS; WITHOUT GUIDANCE, THE VALIDITY OF SCORES OF LONGSTANDING STATE AND LOCAL CONTRIBUTION LIMITS, AND THE 24-YEAR-OLD FEDERAL LIMITS, WILL BE UNCERTAIN, JEOPARDIZING THE STABILITY OF NUMEROUS CAMPAIGN FINANCE REGIMES.

In its narrowest holding, the Eighth Circuit's decision summarily invalidating Missouri's $1,075 campaign contribution limit for statewide offices has created a direct split with the Sixth Circuit's recent decision upholding a $1,000 limit for similar races. *See Kentucky Right to Life*, 108 F.3d at 648. More generally, the Eighth Circuit's approach to applying *Buckley* is at odds with that of other courts. The lower courts have exhibited, and indeed expressed, confusion about how to evaluate which contribution limits are constitutional under *Buckley* and which are not. The decision here is but the latest illustrating the critical need for this Court to clarify the standard for determining when contribution limits are constitutional under the *Buckley* decision. Absent such further guidance, the validity of scores of longstanding state and local contribution limits, and the 24-year-old federal limit, will be uncertain, jeopardizing the stability of numerous campaign finance regimes.

Since the *Buckley* decision, scores of states and localities have enacted basic limits on the dollar amounts of contributions to candidates, many of which hover around the federal $1,000 limits approved in *Buckley*. (App. 42a-44a) (listing the 35 states and many of the localities that have adopted contribution limits). For more than a decade after the *Buckley* decision, limits on individual

contributions to candidates operated unchallenged, undoubtedly due to a presumption, even by their critics, that imposing contribution limits was a constitutional mechanism for achieving campaign finance reform. However, in recent years, constitutional challenges to campaign contribution limits have begun to appear. In large part, the lawsuits have challenged limits on contributions to candidates that were lower than the $1,000 limit upheld in *Buckley*. *See Russell v. Burris*, 146 F.3d 563, 571 (8th Cir. 1998) ($300 and $100 per election), *cert. denied*, 67 U.S.L.W. 3177 (U.S. Nov. 16, 1998) (No. 98-397); *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995) ($300 and $100 per election cycle); *California ProLife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1292 (E.D. Cal. 1998) ($100 to $500 per election), *appeal docketed*, No. 98-15308 (9th Cir. Feb. 3, 1998); *National Black Police Ass'n v. District of Columbia Bd. of Elections and Ethics*, 924 F. Supp. 270, 274-75 (D.D.C. 1996) ($50 to $100 per election cycle), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997). More recently, challenges have been brought to contribution limits that equal, or, as in this case, exceed *Buckley*'s limits. *See Kentucky Right to Life, Inc.*, 108 F.3d at 648 ($1,000 per cycle); App. 1a (court of appeals decision) ($250 to $1,075 per election). The pattern of these decisions reveals confusion about how to evaluate the constitutionality of contribution limits under *Buckley* with respect to key aspects of the doctrine, including the appropriate standard of review, the establishment of the state's interests, and the circumstances in which it is appropriate for a court to use a "scalpel to probe" the precise dollar amount of a contribution limit. *Buckley*, 424 U.S. at 30. The doctrinal confusion in turn leaves legislators and citizens who are drafting initiatives with inadequate guidance about the type of evidence they need to support contribution limits.

Without question, the Eighth Circuit's decision in this case will spur scores of additional lawsuits challenging contribution limits under which states have long been operating effectively, as well as new challenges to the federal limit. The confusion in the lower courts over how to evaluate such claims will throw the integrity of many states' campaign finance regimes into doubt.

There is an urgent need for this Court to clarify *Buckley* in order to provide cities, states, and the federal government with coherent rules to structure their electoral processes.

A. The Circuits Are Split on the Appropriate Standard of Review for Evaluating First Amendment Challenges to Contribution Limits.

Buckley does not provide lower courts with adequate guidance as to the appropriate standard of review for evaluating First Amendment challenges to contribution ceilings. The split among the Eighth, Ninth, and Sixth circuits is a clear indication that this Court should revisit and clarify this standard.

The *Buckley* Court's review of contribution limits begins with the observation that such limits impose "only a marginal restriction upon the contributor's ability engage in free communication," *Buckley*, 424 U.S. at 20, and continues with the holding that the $1,000 limits at issue there "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues," *id.* at 29. After discussing the government's interest in fighting corruption and the limits' precise focus on that interest, the Court holds that under the "rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms" caused by the contribution limits. *Id.*

Then-Justice Rehnquist has since stated:

> The Court in *Buckley v. Valeo*, never suggested that the interest served by the campaign limitation provision was a "compelling" one, nor examined the provision to determine whether it was sufficiently tailored to the interest to survive "heightened scrutiny." The Court was satisfied that the provision had only an indirect and minimal effect on First Amendment interests, as well as a *rational basis*.

Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 29 n.2 (1986) (Rehnquist, J. dissenting) (emphasis added). In *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) ("*CalMed*"), members of the Court disagreed about whether *Buckley* applied a different, and lower, standard of scrutiny to contribution limits than to spending limits. *Compare CalMed*, 453 U.S. at 196 (plurality opinion) (stating that "speech by proxy," such as by contributions, is not "entitled to full First Amendment protection"), *with CalMed*, 453 U.S. at 202 (Blackmun, J., concurring) (disagreeing with the plurality's suggestion that contribution limits receive a level of scrutiny less than "rigorous"). In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986), the Court stated, "[w]e have consistently held that restrictions on [direct] contributions require less compelling justification than restrictions on" spending.

The court of appeals here insisted that strict scrutiny was the appropriate standard of review for contribution limits and demanded that the state "demonstrate . . . that it has a *compelling interest* and that the contribution limits at issue are *narrowly drawn* to serve that interest." (App. 5a) (citing *Buckley*, 424 U.S. at 25, *Russell*, 146 F.3d at 567; *Carver*, 72 F.3d at 638).

The two other circuits to reach this issue, however, have declined to apply strict scrutiny. The Ninth Circuit has stated explicitly that "while contribution limitations are reviewed under a rigorous level of scrutiny, they are not reviewed under strict scrutiny." *Vannatta v. Keisling*, 151 F.3d 1215, 1220 (9th Cir. 1998) (adopting portion of concurring opinion as unanimous opinion of the panel) (internal quotations omitted), *petition for cert. filed*, 67 U.S.L.W. 3348 (U.S. Nov. 10, 1998) (No. 98-775); *see Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992). Similarly, the Sixth Circuit recently applied an unarticulated intermediate level of scrutiny to Kentucky's $1,000 individual contribution limits; the Court neither closely scrutinized those limits nor the government's

purposes in adopting them. *See Kentucky Right to Life,* 108 F.3d at 646, 648.

The lower courts disagree as to whether to apply strict scrutiny, some form of intermediate scrutiny, or a w. ghing test when they review contribution limits. That disagreement, and the lack of clarity in *Buckley* that spawned it, leaves courts without basic operating instructions in this crucial area. Accordingly, this Court should grant certiorari to clarify the proper standard of review for contribution ceilings.

B. The Lower Courts Are Divided on How a State May Establish Its Interests in Combating the Appearance and Reality of Corruption.

It is uncontroversial that a state's interest in combating the reality and appearance of corruption supports the capping of campaign contributions. *See Buckley*, 424 U.S. at 26-28; *Colorado Republican*, 518 U.S. at 609. Although *Buckley* sets a low threshold for establishing that interest, the lower courts have not consistently followed *Buckley*. Some courts have treated the state's interest as virtually established as a matter of law; others have required historical proof of actual corruption caused by large campaign contributions. This division demonstrates that *Buckley* has not provided sufficient guidance to lower courts adjudicating challenges to campaign contribution limits. Without such guidance, states within the Eighth Circuit will be barred from using a standard tool of campaign finance regulation — limits on contributions to candidates.

In *Buckley*, the Court suggested that the threshold for demonstrating the need to limit actual corruption is quite low; indeed, because "the scope of such pernicious practices can never be reliably ascertained," the state need show only that the problem of actual corruption is not "illusory." *Buckley*, 424 U.S. at 27. The *Buckley* Court then concluded that anecdotal evidence of large contributions made during the 1972 elections sufficiently demonstrated that the asserted problem of corruption in the federal government was not "illusory." *Id.* at 27 & n.28.

Similarly, the *Buckley* Court found that the government could show that an appearance of corruption exists even when the "coercive influence of large financial contributions on candidates' positions and on their actions if elected to office" has no basis in reality, but is only "imagined." *Id.* at 25. Because one of *Buckley*'s core assumptions is that the appearance of impropriety is "*inherent* in a regime of large individual contributions," *id.* at 27 (emphasis added), *Buckley* suggests that a low threshold of proof is required to show a government interest in combating the appearance of corruption. *See id.*; *see also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (state had sufficiently demonstrated a danger of real or apparent corruption caused by corporate political expenditures because "[c]orporate wealth *can* unfairly influence elections") (emphasis added). The *Buckley* Court cited no specific evidence of the appearance of corruption in the federal system but relied on a presumed public awareness of the opportunities for abuse. *See Buckley*, 424 U.S. at 27.

The Eighth Circuit's decision here, however, has taken *Buckley*'s low and deferential threshold and twisted it into a requirement that the state prove that there is a "real problem with corruption or a perception thereof as a direct result of large campaign contributions." (App. 6a). Thus, the Eighth Circuit held that uncontroverted evidence that the legislature believed that large contributions "create both the appearance that contributors could purchase the votes of elected officials and the danger of actual vote-buying" was not sufficient to allow the state to survive summary judgment. (App. 15a) (Gibson, J. dissenting). Furthermore, evidence that the public overwhelmingly supported an initiative that enacted limits even lower than those at issue, and newspaper articles and editorials describing the pernicious effects of large contributions, were all insufficient to defeat Shrink Missouri Government PAC's motion for summary judgment. *Compare* App. 6a-7a (court of appeals opinion) (failing to address the district court's reliance on such evidence), *with* App. 31a-32a & nn. 6-7 (district court opinion) (relying on such evidence), As the dissent noted, even the evidence found sufficient in *Buckley* could not survive under the Eighth Circuit's standards. (App. 10a)

(Gibson, J., dissenting) (*Buckley* affirmed the FECA limits "[u]pon a record more slender than the one before us").

In *Russell v. Burris*, the Eighth Circuit first applied their impossibly stringent standard of proof for establishing the requisite appearance of corruption. 146 F.3d at 569-70. The court of appeals described its standard as one of objective reasonableness, *see id.* at 569, but, in application, the court required proof of actual bribery or extortion in order to support any claim of apparent corruption, *see id.* at 570. In striking Arkansas' contribution limits, the court of appeals repeatedly complained of the government's failure to show actual *quid pro quo* corruption or other illegality, although it acknowledged the evidence that "there was a 'uniform' public perception of corruption associated" with one bill, *id.* at 569, and that one lawmaker received substantial contributions from lobbyists who had business before his committee, *id.* at 569-70. The court of appeals effectively held that a perception of corruption is reasonable only when it is based on actual *quid pro quo* exchanges of money or other clearly unlawful conduct. As the decisions here and in *Russell* demonstrate, the Eighth Circuit's standard makes it virtually impossible for a state to prove that it has a sufficient interest in combating the appearance of corruption to justify contribution limits.

At the other end of the spectrum, the Sixth Circuit appears to accept as a matter of law that states have established an interest in addressing the appearance and reality of corruption even in the absence of any specific evidence to that effect. *See Kentucky Right to Life*, 108 F.3d at 646-48 (noting at the outset of opinion that "[n]umerous Kentucky public officials have been convicted of abusing their political offices for personal gain over the past twenty-five years" but not reviewing any specific evidence of the appearance or reality of corruption relating to large contributions); *see also Montana Right to Life Ass'n v. Eddleman*, 999 F. Supp. 1380, 1386 (D. Mont. 1998) (denying summary judgment to plaintiffs without addressing government's proof of corruption).

A handful of courts take an intermediate approach, requiring that the state come forward with some indeterminate quantum of anecdotal evidence of, at the very least, the public's perception that large campaign contributions are unduly influencing officeholders. For instance, a district court in California considering a challenge to a 1996 initiative imposing contribution limits held that evidence of several bribery convictions and a government investigation of the state legislature indicated that the problem of corruption was "not illusory." *California ProLife Council PAC*, 989 F. Supp. at 1294-95. The California district court also held, as did the district court here, that the "persistence of the . . . electorate" in approving referenda imposing contribution limits "appears to demonstrate a wide-spread" perception of corruption in the state sufficient to establish the government's interest in limiting contributions even for offices where there was no evidence of corruption. *Id.* at 1295; *see also* App. 32a n.7.

In most areas involving the regulation of campaigns and elections, the Court does not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1372 (1997) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)); *see United States v. National Treasury Employees Union*, 513 U.S. 454, 473 (1995) (upholding ban on honoraria given to high-level federal officials because Congress "reasonably could assume" that honoraria to higher ranking officials could appear improper).[12] For instance, when considering ballot access requirements, the Court has not required the government to make a particularized showing of its interests. The Court has explained:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous

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12. Notably, Chief Justice Rehnquist would have deferred to the government's determination that the appearance of impropriety required a ban on honoraria for all employees. *National Treasury Employees Union*, 513 U.S. at 494 (Rehnquist, C.J., dissenting).

> candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the evidence marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.

Munro, 479 U.S. at 195-96 (internal quotations omitted).

In *Buckley* and its progeny, this Court has similarly suggested that it does not require elaborate, empirical verification of the state's interest in combating the appearance of corruption from large contributions. *See Buckley*, 424 U.S. at 28-30; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."). The Eighth Circuit, however, has already traveled far down that path, opening the door to "endless court battles over the sufficiency of the evidence marshaled by a State to prove [its interest]." *Munro*, 479 U.S. at 195 (internal quotations omitted). If this Court intends for the state's interest to be governed by a different standard in regulating campaign contributions than in other areas of election regulation, it should make that standard clear. Otherwise, it should confirm that elaborate, empirical proof is not required in this area as well.

C. Lower Courts Are Divided on How to Determine When Contribution Limits Are "Different in Kind" from the $1,000 Limits Upheld in *Buckley*.

In *Buckley*, having determined that the federal $1,000 contribution limits had only a "limited effect" on First Amendment rights and advanced the government's "weighty interests" in combating the actuality and potential for corruption, 424 U.S. at 29, the Court refused to scrutinize the precise dollar amount of a contribution limit to determine whether a higher limit may have

been equally effective in advancing the government's interest. Indeed, the Court explicitly admonished that such scrutiny is inappropriate, explaining that if a court "is satisfied that some limit on contributions is necessary, [it] has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* at 30 (internal citation and quotations omitted).[13] However, in the very next sentence, the Court opened the door to such scrutiny, stating that "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* The Court did not elaborate on its meaning, except to offer citations comparing two cases involving registration deadlines for switching political party affiliations, *Kusper v. Pontikes*, 414 U.S. 51 (1973) (striking 23-month requirement), and *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (upholding 11-month requirement). *See Buckley*, 424 U.S. at 30.

The lower courts have divided on the standard for when they must take a "scalpel to probe," *id.* at 30, the precise level of a contribution limit because it is "different in kind," *id.*, from the $1,000 limit approved in *Buckley*.

- *A Flat Numerical Comparison*: The Sixth Circuit has applied a test of flat numerical comparison, holding that Kentucky's $1,000 election year limit on campaign contributions "is not different in kind" from the $1,000 per election limit approved in *Buckley* because the two limits are "nearly identical." *See Kentucky Right to Life*, 108 F.3d at 648.

- *An Inflation-Adjusted Numerical Comparison*: The Eighth Circuit has applied an inflation-adjusted numerical comparison that uses as its constitutional benchmark not

13. Thus, according to *Buckley*, a court may not scrutinize the level of contribution limits or invalidate them, because some, indeed most, contributors who wished to contribute above the contribution limits did not seek to improperly influence officeholders, or because $1,000 is too low to corrupt candidates for statewide and national office. *Id.* at 29-31.

FECA's current $1,000 limit, but the present value of $1,000 in 1976, which is approximately $2,500. *E.g.*, *Russell*, 146 F.3d at 570-71 (using inflation adjustment to find contribution limits "different in kind"); *Carver*, 72 F.3d at 641-42 (same); *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994) (same); *see generally* Craig M. Engle, *et al.*, *Buckley Over Time: A New Problem with Old Contribution Limits*, 24 J. Legis. 207, 211-19 (1998) (arguing that the diminished value of $1,000 after two decades amounts to a difference in kind).

- *A Functional Approach*: Other courts have analyzed a difference in kind as unrelated to any numerical comparison to the $1,000 limit in *Buckley* and rather applied a functional approach that asks whether the effect of the challenged law is to severely burden constitutionally protected activity. *See California ProLife Council PAC*, 989 F. Supp. at 1298 (finding a difference in kind only after finding that California's limits will "make it *impossible* for the ordinary candidate to mount an effective campaign for office") (emphasis added); *Russell v. Burris*, 978 F. Supp. 1211, 1223 (E.D. Ark. 1997) (finding persuasive argument that "contribution limits amount to a difference in kind, when compared to the limits upheld in *Buckley*, because the limits do not permit the same quality of political expression and association that the FECA limits allowed"), *rev'd on other grounds*, 146 F.3d 563 (8th Cir.), *cert. denied*, 67 U.S.L.W. 3177 (U.S. Nov. 16, 1998) (No. 98-397); *see also* William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L Rev. 483, 531 (1996) ("Differences in degree may take on constitutional dimension and become differences in kind, but the distinction should not rest on mathematical comparison alone.").

The lower courts' division over how to evaluate whether contribution limits are "different in kind" from the $1,000 limits

approved in *Buckley* is hardly academic. Like the standard of scrutiny to be applied, the test for determining when a campaign contribution limit is "different in kind" often determines whether the limit stands or falls. *Compare Russell v. Burris*, 978 F. Supp at 1225 (applying functional approach and upholding $200 limit on contributions to PACs because in its six years in effect "the $200 limit has not prevented 'political committees from amassing the resources necessary for effective advocacy'"), *with Russell v. Burris*, 146 F.3d at 571 (applying inflation-adjusted numerical comparison and invalidating $200 PAC contribution limit without addressing the district court's finding).

Without guidance, lower courts will continue to take inconsistent approaches, and reach inconsistent results, in First Amendment challenges to contribution limits. It is particularly critical for the Court to address the issue now, before this case sets off a torrent of challenges to the $1,000 federal limits still in effect. In response to such a challenge, a court taking the "flat numerical approach" would clearly uphold any $1,000 limit; a court taking an "inflation-adjusted numerical approach" would strike the federal limits; a court taking a functional approach would be likely to uphold the limit, based on the continued ability of candidates in federal races to raise sufficient funds for effective advocacy.[14]

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14. Indeed, the division on the Eighth Circuit panel in this case demonstrates that how the "difference in kind" test is applied determines the outcome. In a portion of his opinion not joined by the other judges on the panel, Chief Judge Bowman argued that Missouri's limits were "different in kind" from those in *Buckley*, applying the inflation-adjustment numerical approach. (App. 8a) ("After inflation, limits of $1075, $525, and $275 cannot compare with the $1,000 limit approved in *Buckley* twenty-two years ago."). In his dissenting opinion, Judge Gibson argued that the limits were not different in kind, employing the flat numerical approach: "When we compare the $1075 contribution limit . . . for each election with the $1,000 upheld by *Buckley*, there is simply no difference in kind." (App. 11a) (Gibson J., dissenting); *see also* App. 12a (noting that even Missouri's $525 and $275 "compare favorably" with *Buckley*'s $1,000 limit because they apply to races in districts smaller that Congressional districts).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Additionally, in view of deep conflict between the court of appeals' decision and this Court's decision in *Buckley v. Valeo*, the Court may with to consider summary reversal.

Respectfully submitted,

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APPENDIX

APPENDIX

Petitioner Bray adopts by reference and with permission the Appendix contained in the Petition for Writ of Certiorari filed by petitioners Jeremiah W.(Jay) Nixon, Richard Adams, Patricia Flood, Robert Gardner, Donald Gann, Michael Greenwell, Elaine Spielbusch, and Robert McCulloch. *See Nixon v. Shrink Missouri Government PAC,* Petition for Cert. (filed December 14, 1998).

Nos. 98-963 and 98-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Supreme Court, U.S.
FILED
JAN 6 1999
OFFICE OF THE CLERK

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC
and ZEV DAVID FREDMAN,
Respondents.

JOAN BRAY,
Petitioner,

v.

SHRINK MISSOURI GOVERNMENT PAC,
a political action committee,
ZEV DAVID FREDMAN, and RICHARD ADAMS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SHRINK MISSOURI GOVERNMENT PAC AND ZEV DAVID FREDMAN

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QUESTION PRESENTED

Did the court of appeals hold correctly that Missouri "failed to come forward with evidence" that campaign contributions in excess of $275, $525, or $1,075 cause either corruption or the appearance of corruption?

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IN THE

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OCTOBER TERM, 1998

No. 98-963

JEREMIAH W. (JAY) NIXON,
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BRIEF IN OPPOSITION OF RESPONDENTS SHRINK MISSOURI GOVERNMENT PAC AND ZEV DAVID FREDMAN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 161 F.3d 519 (8th Cir. 1998). The court of appeals' order entering an injunction pending appeal (Pet. App. 20a-23a) is reported at 151 F.3d 763 (8th Cir. 1998). The opinion of the district court (Pet. App. 24a-41a) is reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998).

JURISDICTION

The court of appeals entered its judgment on November 30, 1998. A petition for writ of certiorari was filed on December 11, 1998 by Jeremiah W. Nixon, Attorney General of Missouri, *et al.*, and it was placed on the docket on December 14, 1998. A second petition for writ of certiorari was filed on December 15, 1998, by an intervenor on appeal, Joan Bray, and it was placed on the docket on December 16, 1998.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The court of appeals held that Missouri's $275, $525, and $1,075 limits on campaign contributions violate the First Amendment. It rejected Missouri's contention "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." Pet. App. 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* (citations omitted). Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. Indeed, "the State [was]

[1] The Attorney General's petition is designated Mo. Pet., and the intervenor's petition is designated Bray Pet. The two petitions share an appendix, which is attached to the Attorney General's petition.

unable to adduce sufficient evidence even to show that there is a genuine issue of material fact regarding its alleged interest." *Id.* at 7a.

1. Before 1994, Missouri did not limit either political contributions to candidates for state and local office or candidates' political expenditures. In 1994, Missouri imposed limits on candidates' campaign expenditures and on political contributions in two sets of amendments to Missouri's Campaign Finance Disclosure Law. Mo. Rev. Stat. §§ 130.011 *et seq.* (1994 & Supp. 1997). In July 1994, the Missouri legislature enacted Senate Bill 650, which imposed limits on campaign contributions and expenditures. On November 8, 1994, the Missouri electorate approved Proposition A, a ballot initiative that also established campaign finance regulations and expenditure limits. The Missouri Attorney General ruled that Proposition A, which was to become effective immediately, superseded Senate Bill 650 to the extent its provisions were more restrictive and that, otherwise, Senate Bill 650 would become effective on January 1, 1995. 94 Mo. Op. Att'y Gen. 218 (Dec. 6, 1994).

In 1995, the Court of Appeals for the Eighth Circuit held that certain campaign expenditure limits imposed by Senate Bill 650 and by Proposition A violated the First Amendment. *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The court of appeals also held that Proposition A's $100, $200, and $300 limits on campaign contributions violated the First Amendment. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The *Carver* court held that Missouri had "no evidence as to why the Proposition A limits of $100, $200, and $300 were selected." 72 F.3d at 642-43. The state had "no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Id.* at 643.

After the invalidation of the contribution limits set by Proposition A, the limits imposed by Senate Bill 650 became effective. Mo. Rev. Stat. § 130.032 (Supp. 1997). Senate Bill 650 originally limited campaign contributions to candidates for office in Missouri on a sliding scale from $250 to $500 to $1,000. *Id.* § 130.032.1. It also provided that these contribution limits "shall be increased" to take inflation into account, *id.* § 130.032.2, and, in January 1998, the Missouri Ethics Commission increased the contribution limits.

Missouri statutes now prohibit contributions of more than $275 to candidates for state representative or for offices in districts with a population of under 100,000, *id.* § 130.032.1(3), (4); contributions of more than $525 to candidates for state senate or for any office in electoral districts with a population between 100,000 and 250,000, *id.* § 130.032.1(2), (5); and contributions of more than $1,075 to candidates for governor, lieutenant governor, secretary of state, state treasurer, state auditor and attorney general, as well as to candidates in districts with a population of at least 250,000. *Id.* § 130.032.1(1), (6). Contributors and candidates who violate these limits are subject to criminal penalties and to substantial civil sanctions. *Id.* §§ 130.032.7, 130.081 (1994 & Supp. 1997).

2. On May 12, 1998, the district court, on cross-motions for summary judgment, upheld Missouri's campaign contribution limits. Pet. App. 24a-41a. It found that "[t]he issue is purely legal: do Missouri's limits on campaign contributions violate the first amendment?" and that "regulation of first amendment rights" is subject to " 'strict scrutiny.' " *Id.* at 30a. The court did not decide whether Missouri "must demonstrate that campaign contributions in excess of the statutory limits cause some 'real harm,' i.e., that such contributions cause either corruption or the appearance of corruption." *Id.* Instead, the court held that "[i]f a showing of 'real harm' is required (the state claims it is not), . . . defendants here have made that showing." *Id.*

The district court relied on "evidence in the form of an affidavit from the state senator who co-chaired the Interim Joint Committee on Campaign Finance Reform at the time of Senate Bill 650's passage." *Id.* at 31a. This senator, Wayne Goode, stated that the committee " 'heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence' " and "testified to his belief that contributions in excess of the limits set by Missouri 'have the appearance of buying votes as well as the real potential to buy votes.' " *Id.* (footnote omitted).

The district court also held that the Missouri contribution limits are "narrowly tailored", *id.* at 35a-37a, and that "the effect of inflation since *Buckley* [*Buckley v. Valeo*, 424 U.S. 1 (1976)] was decided has not created a 'difference in kind' between a $1,000 contribution in 1976, and a $1,075 contribution in 1998." *Id.* at 37a (footnote omitted).

3. On July 23, 1998,[2] the court of appeals entered an order enjoining enforcement of the campaign contribution limits pending the appeal. Pet. App. 20a-23a. The court of appeals based this order on *Russell v. Burris*, 146 F.3d 563 (8th Cir.), *cert. denied*, 119 S.Ct. 510 (1998), a then very recent June 4, 1998 decision. In *Russell*, the court of appeals had held that that Arkansas' $100 and $300 limits on campaign contributions violated the First Amendment because the state "did not prove that the perception of corruption . . . was objectively reasonable." 146 F.3d at 569.

In granting the injunction pending appeal, the court of appeals found that "[a]ll campaign contribution limits restrict political speech, and . . . implicate the First Amendment." Pet. App. 22a. It then held that "it seems likely

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[2] The opinion of the court of appeals twice states that the injunction was entered on July 27, 1998. Pet. App. 3a, 4a. In fact, the court of appeals entered its order on July 23 and then amended the order by making a grammatical correction on July 27, 1998.

that the state has failed in its burden of proof to show 'that there is real or perceived undue influence or corruption attributable to large political contributions . . . and . . . that [the contribution limits] are narrowly tailored to address that reality or perception.' " *Id.* (*quoting Russell v. Burris*, 146 F.3d at 568). The court also held that "it is likely the state has failed to show 'that a reasonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption.' " *Id.* (*quoting Russell v. Burris*, 146 F.3d at 569). The court of appeals then noted that the Missouri campaign contribution limits "are, after adjustment for inflation, dramatically lower than the $1,000 limit upheld in *Buckley* . . . and do not appear to be narrowly tailored to address any legitimate interest in avoiding corruption or the appearance of corruption." *Id.*

4. Missouri applied to this Court, on July 30, 1998, for an order staying the injunction pending appeal. Justice Thomas denied the application on July 31, 1998.

5. The court of appeals reversed the judgment of the district court and held that the Missouri campaign contribution limits violate the First Amendment. Pet. App. 9a, 9a-10a (Ross, J., concurring).

a. Chief Judge Bowman, joined by Judge Ross, held that the state had not carried its burden of justifying the $275, $525, and $1,075 campaign contribution limits. *Id.* at 5a-7a; 9a-10a (Ross, J., concurring).

The court of appeals first rejected Missouri's attempt to "posit[], citing *Buckley*, that corruption and the perception thereof are inherent in political campaigns where large contributions are made" and "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." *Id.* at 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions

in amounts greater than the limits in place." *Id.* (citations omitted). In imposing this burden on Missouri "to prove its compelling interest," the court of appeals expressly invoked this Court's decisions in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). *Id.* at 6a n.3.

Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. The court of appeals refused to "extrapolate" from examples of corruption noted by the *Buckley* Court "that in Missouri at this time there is corruption or a perception of corruption from 'large' contributions, without some evidence that such problems really exist." *Id.* (citations omitted). The court refused to "infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago." *Id.*

The state's evidence—Senator Goode's affidavit—did not fill the evidentiary void. The court of appeals found that this senator "pointed to no evidence that 'large' campaign contributions were being made in the days before limits were in place, much less that they resulted in real corruption or the perception thereof." *Id.* at 7a (citation omitted). Although this senator stated "that he and his colleagues believed that there was the 'real potential to buy votes' if the limits were not enacted, and that contributions greater than the limits 'have the appearance of buying votes,' " he "did not state that corruption then existed in the system." *Id.* Moreover, there was no way for the court of appeals to determine "whether this single legislator's perception of corruption is the 'public perception', whether it is objectively 'reasonable,' and whether it 'derived from the magnitude of . . . contributions' that historically have been made to candidates running for

public office in Missouri." *Id.* (*quoting Russell v. Burris*, 146 F.3d at 569).

In short, Missouri "failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB650 imposes on campaign contributions." *Id.* Indeed, "the State [was] unable to adduce sufficient evidence even to show that there is a genuine issue of material fact regarding its alleged interest." *Id.*

b. Chief Judge Bowman, writing separately,[3] also determined that the $275, $525, and $1,075 contribution limits are not "narrowly tailored" because they "are so small that they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms." *Id.* at 7a, 8a. The Chief Judge found that "[a]fter inflation, limits of $1,075, $525, and $275 cannot compare with the $1,000 limit approved in *Buckley* twenty-two years ago." *Id.* at 8a (footnote omitted). Noting the contention that "$1,075 in 1976 dollars is the equivalent of just $378 in purchasing power today,"[4] *id.* at 8a n.4, Chief Judge Bowman found that "[i]n today's dollars, the SB650 limits appear likely to 'have a severe impact on political dialogue' by preventing many candidates for public office 'from amassing the resources necessary for effective advocacy.'" *Id.* at 8a (*quoting Buckley*, 424 U.S. at 21).

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[3] Judge Ross agreed with Chief Judge Bowman "that the State failed to satisfy its evidentiary burden." Pet. App. at 9a-10a (Ross, J., concurring). On the basis of "the reasons stated by Judge Gibson [in dissent]," he did "not join in part III B of Judge Bowman's opinion finding that the contribution limits are different in kind from those approved in *Buckley v. Valeo*, 424 U.S. 1 (1976)." *Id.* at 10a.

[4] Chief Judge Bowman rejected Missouri's contention that the Consumer Price Index (CPI) should not be used "to calculate the effects of inflation on dollars spent for campaign contributions" and noted that the state itself uses the CPI to account for the effects of inflation after the date (1994) when the contribution limits were enacted. Pet. App. 8a n.4 (*citing* Mo. Rev. Stat. § 130.032.2 (Supp. 1997)).

Thus, "absent the State's having proven the actual necessity for such a heavy-handed restriction of protected speech," the $275, $525, and $1,075 contribution limits were " 'too low to allow meaningful participation in protected political speech and association, and thus [were] not narrowly tailored to serve' the alleged interest." *Id.* (citation omitted).

The Chief Judge specifically disclaimed any attempt to " 'fine tun[e]' the work of the Missouri legislature" or to exercise "authority that is not ours." *Id.* (*citing Buckley*, 424 U.S. at 30). He concluded that "the difference between these limits of $1,075, $525, and $275, and larger dollar limits that might be constitutionally sound . . . are not 'distinctions in degree' but 'differences in kind.' " *Id.* at 8a-9a (citations omitted). He "remind[ed] the State that it has the burden of showing that any limits it places on campaign contributions are narrowly tailored to serve the State's compelling interest in addressing proven 'real or perceived undue influence or corruption attributable to large political contributions.' " *Id.* at 9a (*quoting Russell v. Burris*, 146 F.3d at 568). Any "problem of judicial line-drawing can be expected largely to disappear" if "those who would regulate and limit constitutionally protected political speech satisfy their heavy burden of proof." *Id.*

c. Judge Gibson, in dissent, would have upheld Missouri's $275, $525, and $1,075 contribution limits because he "[could] not distinguish *Buckley*." *Id.* at 10a.

Judge Gibson found that there was no "difference in kind" between Missouri's $1,075 limit and the "$1,000 [limit] upheld in *Buckley*," and he would have upheld the lower $275 and $525 contribution limits because *Buckley* had noted Congress' power to structure contribution limits with respect to graduated expenditure limits. *Id.* at 11a, 12a. He rejected Chief Judge Bowman's "argument . . . that inflation has dissipated the similarity between the limits in this case and those approved in *Buckley*";

in his view, "[i]nflation has not undermined *Buckley*'s precedential weight or modified its holding." *Id.* at 13a.

Judge Gibson also concluded that "the State has adequately justfied the contribution limits at issue." *Id.* at 14a; *see id.* at 14a-18a. Missouri, "by the Goode affidavit, [had] demonstrated . . . the dangers posed by unlimited campaign contributions." *Id.* at 17a. Judge Gibson could not "reconcile the short shrift given the Goode affidavit . . . with the Supreme Court's approach in *Buckley,* which cited no actual evidence that large contributions might give rise to the appearance of political corruption and which deferred to what Congress could have reasonably concluded." *Id.* (footnote and citations omitted).

REASONS FOR DENYING THE WRIT

Petitioners have not presented any question that warrants this Court's review. This case turns on a straightforward application of the common-sense proposition, frequently stated by this Court, that conjectural harms do not justify restrictions on speech. As the court of appeals recognized (Pet. App. 6a n.3), this Court has held that

> "[w]hen the Government defends a regulation of speech . . ., it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulations will in fact alleviate these harms in a direct and material way."

United States v. National Treasury Employees Union, 513 U.S. at 475 (*quoting Turner Broadcasting System, Inc.,* 512 U.S. at 664 (plurality opinion of Kennedy, J.).

Moreover, as this Court recently held, limits on independent expenditures by political parties violate the First Amendment absent evidence that these expenditures cause some real harm. *Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604 (1996). In *Colorado Republican,* six members of this Court invoked and ap-

plied the same standard as the Eighth Circuit: Justice Kennedy's statement in *Turner Broadcasting System*, 512 U.S. at 664, of the government's duty to demonstrate that regulations of speech address a real harm. 518 U.S. at 618 (Breyer, J., O'Connor, & Souter, JJ.) (citing *Turner Broadcasting System, Inc.*, 512 U.S. at 664 (Kennedy, J.) and noting that "[t]he Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"), *id.* at 647 (Thomas, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part) (citing *Turner Broadcasting System, Inc.*, 512 U.S. at 664 (Kennedy, J.) and noting that "[t]he Government . . . has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent expenditures").

Just as this Court imposed a duty on the national government to demonstrate that political party expenditures cause some harm, the court of appeals required Missouri to demonstrate "that there were genuine problems that resulted from contributions in amounts greater than the limits in place." Pet. App. 5a. Missouri, however, did not "adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest." *Id.* at 7a. Although Judge Gibson argued in dissent that a state senator's affidavit was sufficient to justify the contribution limits, *see id.* at 14a-17a, disagreement about the weight to be given Missouri's limited evidence does not warrant this Court's attention.

Given the actual ground of the court of appeals' judgment—insufficient evidence of harm to justify the $275, $525, and $1,075 contribution limits—petitioners' suggestions of inter-circuit conflict and conflict with this Court's decision in *Buckley* are overstated, and petitioners' assertion that the court of appeals imposed an "impossible burden" on Missouri is mistaken.

1. Any inter-circuit conflict over the validity of state laws prohibiting contributions in excess of $1,000, is, at most, only skin deep. *See* Mo. Pet. 9-10; Bray Pet. 13. The Sixth Circuit has upheld a Kentucky $1,000 contribution limit, *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir.), *cert. denied*, 118 S.Ct. 162 (1997), and the Eighth Circuit's judgment may appear at first blush (as Judge Gibson noted in dissent) to "create[] a conflict between the circuits." Pet. App. 18a.

With regard to the actual ground for the Eighth Circuit's judgment, however, there is no conflict with the Sixth Circuit.[5] The Sixth Circuit simply did not have any

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[5] The state's claim that the "panel majority" (Mo. Pet. 8) acknowledged a conflict with the Sixth Circuit is mistaken. Chief Judge Bowman, writing separately (see note 3 *supra*), concluded that Missouri's $275, $525, and $1,075 contribution limits were "different in kind" than the $1,000 limit at issue in *Buckley*, and he conceded that his conclusion was not consistent with Sixth Circuit decision in *Kentucky Right To Life, Inc. v. Terry*. Pet. App. 9a (*quoting* the *Terry* court as "holding that $1,000 limitation on direct contributions in connection with local and state elections in Kentucky is not different in kind from the $1,000 limitation on direct contributions in connection with federal elections upheld in *Buckley*"). Chief Judge Bowman's separate opinion (Part III B (Pet. App. 7a-9a)), however, is not the opinion of the "panel majority." Judge Ross joined only Part III A (*id.* at 5a-7a) of Chief Judge Bowman's opinion, and they formed a "panel majority" on only one point and held, in Judge Ross' words, "that the State failed to satisfy its evidentiary burden." *Id.* at 10a. Similarly, Chief Judge Bowman's separate opinion does not provide any occasion to address Bray's contention that the lower courts are divided on "how to determine when contribution limits are 'different in kind' from the $1,000 limits upheld in *Buckley*." Bray Pet. 21; *see id.* at 21-24.

Nonetheless, Missouri's $275, $525, and $1,075 contribution limits are in fact "different in kind," not only when compared to the federal $1,000 limit on individual contributions, but also when they are compared to the $5,000 limit on contributions by political committees approved in *Buckley*. 424 U.S. at 35-37. The Missouri contribution limits apply both to individuals and political action committees, like respondent Shrink Missouri Government PAC. Thus,

occasion to consider whether a state, in the words of the Eighth Circuit, must have "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* at 5a (citations omitted). In the Sixth Circuit case, the Kentucky legislature had increased the contribution limit to $1,000 from $500 after plaintiffs filed their opening appellate brief, and counsel "essentially conceded at oral argument that the $1,000 limitation on contributions is constitutional under *Buckley*." *Kentucky Right to Life, Inc. v. Terry,* 108 F.3d at 641-42 & n.10, 642-43 & n.19, 648 n.24. Thus, the Sixth Circuit's cursory approval of Kentucky's $1,000 limit is hardly surprising, and petitioners' assertion here—"it is clear that the limits embodied in Missouri's legislation would be upheld today by the Sixth Circuit"—is strained. Mo. Pet. 5.

2. Petitioners' other suggestion of inter-circuit conflict elevates form over substance. Missouri and Bray assert that the Eighth Circuit has created a conflict with the Ninth and Sixth Circuits in defining the level of scrutiny applicable to contribution limits. *See* Mo. Pet. 10-13; Bray Pet. 15-17. The judgments of the courts of appeals of these three circuits, however, do not raise the broad question that petitioners would have this Court pursue—whether campaign contribution limits should be subject to a lower level of scrutiny (intermediate) than campaign expenditure limits (strict scrutiny). Mo. Pet. 11; Bray Pet. 17.

a. The Eighth Circuit applied strict scrutiny to Missouri's $275, $525, and $1,075 contribution limits and held that Missouri "must demonstrate . . . that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that interest." Pet. App. 5a. The Ninth Circuit recently applied "rigorous, rather

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contrary to the state's contention (Mo. Pet. 5 n.2), Missouri's $275, $525, and $1,075 limits on contributions should also be compared to the federal $5,000 limit as adjusted for inflation.

than strict, scrutiny" to Oregon's limit on out-of-state contributions and held that this Oregon measure "can survive rigorous scrutiny only if it is closely drawn to advance a sufficiently important interest." *Vannatta v. Kiesling*, 151 F.3d 1215, 1216, 1221 (9th Cir.), *petition for cert. filed*, 67 USLW 3348 (Nov. 9, 1998) (No. 98-775). Even assuming that in some circumstances there might be a difference between "strict" and "rigorous" scrutiny, these standards, as actually applied by the Eighth and Ninth Circuits, are the same.

Just as the Eighth Circuit "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits" (Pet. App. 5a), the Ninth Circuit unanimously held that Oregon's prohibition of out-of-district contributions did not "pass muster under the First Amendment" because the state was "unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*." *Vannatta v. Kiesling*, 151 F.3d at 1221 (citations omitted); *see id.* at 1216, 1222 (this portion of concurring opinion adopted as unanimous opinion of the panel). Far from creating a conflict with the Eighth Circuit, the Ninth Circuit relied on a decision of the Eighth Circuit to support its requirement that Oregon must have some evidence that the prohibited political contributions cause corruption. *Id.* at 1221 (*citing Carver v. Nixon*, 72 F.3d at 644, for holding that "limits on the size of contributions were not closely drawn to reducing corruption as state made no showing that small contribution limits were necessary to curb corruption").

In short, there is no conflict between the Eighth and Ninth Circuits. The courts of appeals in both circuits, albeit under differently labeled standards of scrutiny, required Missouri and Oregon to demonstrate that the prohibited campaign contributions cause corruption or the appearance of corruption. The judgments of both the Eighth Circuit and the Ninth Circuit that state campaign

contribution limits violate the First Amendment rest on exactly the same ground: the states did not have any evidence that prohibited political contributions cause any harm.

b. Similarly, there is no conflict between the Eighth Circuit and the Sixth Circuit about the proper level of scrutiny of state limits on campaign contributions to candidates. Bray asserts, for example, that the Sixth Circuit "applied an unarticulated intermediate level of scrutiny to Kentucky's $1,000 individual contribution limits." Bray Pet. 16. The Sixth Circuit, however, did not apply any level of scrutiny—strict or intermediate—to Kentucky's $1,000 limit on individual contributions to candidates.[6] *Kentucky Right To Life, Inc. v. Terry*, 108 F.3d at 648. Instead, the Sixth Circuit, as discussed above, upheld Kentucky's $1,000 contribution limit, which the state legislature had increased from $500 while the appeal was pending, on the basis of counsel's concession. 108 F.3d at 648 & n.24.

3. Petitioners' suggestions that the Eighth Circuit's judgment conflicts with *Buckley* are not well-taken. *See* Mo. Pet. 13-15; Bray Pet. 10-13.

a. Bray asserts that the Eighth Circuit's decision is a "flat rejection" of this Court's holding in *Buckley* "that combating the perception of corruption is a sufficient governmental interest for imposing contribution limits." Bray

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[6] Missouri asserts that the Sixth Circuit adopted "the proposition that a contribution limit 'does not receive the full First Amendment protection.'" Mo. Pet. 12 (*quoting Kentucky Right To Life, Inc. v. Terry*, 108 F.3d at 649). The Sixth Circuit, however, made this observation in the course of analyzing Kentucky's $1,500 limit on aggregate contributions to permanent committees, which it carefully distinguished from the state's $1,000 limit on direct contributions to candidates. *Kentucky Right To Life, Inc. v. Terry*, 108 F.3d at 648-49. Thus, there is no support for Missouri's conclusion that the Sixth Circuit and the Eighth Circuit apply different levels of scrutiny to limits on campaign contributions to candidates. *See* Mo. Pet. 12-13.

Pet. 10. Petitioner is mistaken. The court of appeals did not ignore this Court's determination in *Buckley* that avoiding the appearance of corruption, as well as avoiding corruption itself, are compelling governmental interests. In fact, the court of appeals expressly and repeatedly recognized that both of these interests may be compelling. *E.g.*, Pet. App. 6a ("State . . . must prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions"). Missouri, however, "failed to come forward with evidence" that contributions in excess of $275, $525, or $1,075 caused either corruption or the appearance of corruption. *Id.* at 7a.

b. Petitioners also suggest that the court of appeals' requirement that Missouri must have "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits" (Pet. App. 5a) conflicts with this Court's decision in *Buckley*. Mo. Pet. 13-14; Bray Pet. 17-21. Even assuming, as Missouri asserts, that in *Buckley* the legislative record was "based on razor-thin evidence" and that this Court "was willing to accept largely on faith Congress's assessment of the existence of a compelling problem," the conflict, if any, is more apparent than real. Mo. Pet. 13.

As the court of appeals explained, but both petitions fail to note, "the State's burden to prove its compelling interest" is firmly grounded on this Court's subsequent decisions. Pet. App. 6a n.3 (*quoting United States v. National Treasury Employees Union*, 513 U.S. at 475, and *Turner Broadcasting System, Inc.*, 512 U.S. at 664 (plurality opinion of Kennedy, J.)). Thus, any threat to the $1,000 federal contribution limit upheld in *Buckley* comes not from the Eighth Circuit but from this Court's decisions requiring the national government to demonstrate that restrictions on speech address some real harm. *See Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. at 618, 647; *United States v. National Treasury Employees Union*, 513 U.S. at 475 (*quoting Turner*

Broadcasting System, Inc., 512 U.S. at 664 (plurality opinion of Kennedy, J.)).

4. Finally, petitioners' assertion that the Eighth Circuit imposed an "impossible burden" on the state is mistaken. Mo. Pet. 13; *see id.* at 13-15; Bray Pet. 19 ("impossibly stringent standard of proof"). Missouri, for example, invokes an aphorism—strict in theory, fatal in fact—and claims that "no state legislature could enact a contribution limit that can withstand judicial scrutiny in the Eighth Circuit." Mo. Pet. 12, 15. The court of appeals has not, however, imposed an "impossible burden" on Missouri. Strict scrutiny was fatal here because Missouri, on cross motions for summary judgment, was "unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest" in preventing corruption or the appearance of corruption. Pet. App. 7a.

Given this very limited holding, Bray's concern that the Eighth Circuit requires "elaborate, empirical proof" is misplaced.[7] Bray Pet. 21; *see id.* at 20-21. Similarly, Missouri's concern that the Eighth Circuit's judgment threatens the campaign contribution limits of "[d]ozens of

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[7] Moreover, Missouri's claim that it has "tried to find evidence that would be sufficient to meet the court's standard" is, at the very least, premature. Mo. Pet. 14 n.6. The Missouri legislature enacted the contribution limits at issue in this case in 1994. The court of appeals then held in 1995 that another set of Missouri contribution limits adopted in a 1994 initiative violated the First Amendment because Missouri had "no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Carver v. Nixon*, 72 F.3d at 643. Missouri, however, does not point to any effort that it subsequently made to respond to the Eighth Circuit's decision in *Carver* and "to find evidence that would be sufficient to meet the court's standard." In fact, when the legislature amended the campaign finance statutes in 1997, it set the contribution limits in exactly the same amounts originally enacted by the legislature in 1994. *Compare* Mo. Rev. Stat. § 130.032.1 (1994) *with* Mo. Rev. Stat. § 130.032.1 (Supp. 1997).

states and scores of local jurisdictions" is exaggerated. Mo. Pet. 16. These contribution limits are "subject to serious constitutional challenge under the Eighth Circuit's rationale" (Mo. Pet. 16) only if other states and localities, like Missouri, are "without some evidence" that there is a "real problem with corruption or a perception thereof as a direct result of large campaign contributions." Pet. App. 6a.

CONCLUSION

The petition for writ of certiorari should be denied.

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In The

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JEREMIAH W. NIXON, et al.,

v. *Petitioners,*

SHRINK MISSOURI GOVERNMENT PAC and ZEV DAVID FREDMAN,

Respondents.

JOAN BRAY,

v. *Petitioner,*

SHRINK MISSOURI GOVERNMENT PAC, et al.,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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INTEREST OF AMICI

Amici include the following Secretaries of State: Dan Gwadesky of Maine, Mike Cooney of Montana, James Langevin of Rhode Island, Riley Darnell of Tennessee, Ken Hechler of West Virginia, and Doug LaFollette of Wisconsin.[1] *Amici* also include Steven G. Churchwell, General Counsel to the California Fair Political Practices Commission, Robert Watada, Executive Director of the Hawaii Campaign Finance Spending Commission, and George Russell, Director of the Kentucky Registry of Election Finance. In these positions, *amici* serve as chief election officers or supervisors of campaign finance in their States. They thus have considerable experience with the issues raised in this case, and in particular have witnessed the serious threats that unlimited campaign contributions pose to the integrity of the electoral process.

Amici seek review of the Eighth Circuit's decision in this case because that court's interpretation of *Buckley v. Valeo*, 424 U.S. 1 (1976), threatens to undermine reasonable campaign contribution limits at the state, local and federal level that are necessary to preserve the health of our democracy. Relying on this Court's conclusion that legislatures may eliminate "the opportunity for abuse inherent in the process of raising large monetary contributions" (*Buckley*, 424 U.S. at 30), thirty-five states and a

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

large number of localities have enacted campaign contribution limits similar to those at issue here, based on their studied belief that such regulations are necessary to prevent actual and apparent corruption in state and local government. These reasonable contribution limits help stem widespread public cynicism about elected officials' ability to govern in the public interest and check the capacity of wealthy interests to exert improper influence over legislative and executive policies. Left undisturbed, the Eighth Circuit's decision will erect a new, insuperable barrier for states to justify the adoption of such limits, undermining existing laws throughout the country and chilling the future efforts of other jurisdictions to enact similar, necessary regulations.

STATEMENT

In determining the proper balance between the need for funds adequate to run viable campaigns and the potential for buying influence, the Joint Interim Committee on Campaign Finance Reform of the Missouri General Assembly entertained testimony reflecting "a broad spectrum of opinions" before arriving, by consensus, at a schedule of carefully graduated contribution limits that would be adjusted over time according to inflation. (Appendix ("App.") 14a-15a).[2] Notably, the highest of

[2] In this brief, citations to "App." refer to the Appendix attached to the Petition for Writ of Certiorari filed by petitioners Jeremiah W. (Jay) Nixon, Richard Adams, Patricia Flood, Robert Gardner, Donald Gann, Michael Greenwell, Elaine Spielbusch, and Robert McCulloch. *See Nixon v. Shrink Missouri Government PAC*, Petition for Writ of Certiorari (filed December 14, 1998).

these contribution limits, which apply to statewide offices and to local offices where the population exceeds 250,000, match the limits applicable to candidates for federal office upheld in *Buckley* which are still in force today. In crafting appropriate contribution limits, the Missouri General Assembly conducted hearings and internal discussion regarding the actual condition of the state electoral system. App. 15a, 31a. After detailed deliberation, Missouri adopted limits that would address the danger of *quid pro quo* corruption and, equally importantly, combat the appearance of such corruption.

The District Court, noting that "[t]here is more than ample reason to defer to the considered judgment of the Missouri legislature", found the limits entirely consistent with this Court's decision in *Buckley*. App. 41a. A divided panel of the Eighth Circuit, however, reversed, announcing three distinct interpretations of what a state must demonstrate to justify the imposition of contribution limits and casting a pall of doubt over the future viability of such limits throughout the country. In so doing, the Eighth Circuit created a stark split with the Sixth Circuit, which recently upheld a $1,000 contribution limit for similar campaigns. *See Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir.), *cert. denied*, 118 S. Ct. 162 (1997). By rejecting out of hand the Missouri legislature's informed judgment regarding the actual conditions of Missouri politics, the panel majority ignored a central tenet of this Court's decision in *Buckley* and usurped a role specifically reserved by that case to the legislative branch of government.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS WHICH RECOGNIZE THAT LARGE CAMPAIGN CONTRIBUTIONS CAUSE REAL AND IRREPARABLE HARM TO OUR POLITICAL PROCESSES.

The panel majority below has effectively nullified an integral premise of this Court's campaign finance decisions by interpolating a new and impossible burden of proof for states to carry in order to justify contribution limits. *See* App. 19a (Gibson, J., dissenting). While the *Buckley* Court recognized that the contribution limits are necessary to serve the government's compelling interest in "deal[ing] with the reality or appearance of corruption *inherent* in a system" of large contributions (424 U.S. at 28) (emphasis added), the Court of Appeals insisted that the government does not have such a compelling interest absent proof of actual corruption. *Compare Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) (plurality opinion) (contribution limits serve the government's compelling interest in "assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption"); *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973) (avoiding appearance of improper influence is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent").

The Eighth Circuit's decision flies in the face of this Court's common sense recognition that "the scope of [actual corruption] can never be reliably ascertained". 424

U.S. at 27. By requiring "demonstrable evidence" of "genuine problems" (App. 5a), the panel majority destroyed a major pillar of this Court's analysis of campaign finance, under which "marginal restrictions upon the contributor's ability to engage in free communication" have been approved in light of the grave, self-evident threat to our electoral systems' legitimacy posed by unlimited campaign contributions. *See Buckley*, 424 U.S. at 20-21. *See also FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 500 (1985) (approving "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"); *FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982) ("Nor will [the courts] second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) ("no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth is great, and the legislative purpose prophylactic").

Two decades after this Court first acknowledged the pervasive dangers "inherent in a regime of large financial contributions", the harms caused by unrestricted campaign contributions remain well beyond cavil. Anxiety about the corrosive influence of money in politics dominates public discourse throughout the country.[3] Historical

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[3] *See, e.g.*, E.J. Dionne, *Democracy or Plutocracy?*, THE WASHINGTON POST, op-ed, February 15, 1994, p.A17; Tom Fiedler, *Big Interests Spending Equally Big Bucks: Millions of Dollars Given to Campaigns of Influential Policy Makers*, THE MIAMI HERALD, May 21, 1995, p.14A; Philip B. Heyman & Donald J. Simon, *Parties to Corruption*, THE WASHINGTON POST, op-ed, June 25, 1998, p.A23;

examples of influence peddling and special interest legislation are legion. *See generally,* Charles Lewis and The Center for Public Integrity, *The Buying of Congress: How Special Interests Have Stolen Your Right to Life, Liberty, and the Pursuit of Happiness* (1998).

Public opinion polls at the national level confirm that citizens on all sides of the political spectrum perceive both actual and potential corruption in government. Notably, in a 1996 poll taken directly after the November elections, Americans ranked the "power of special interest groups in politics" second only to "international terrorists" when asked to identify "major threats" to the future of the country.[4] A 1997 poll determined that three-quarters of Americans believe that "public officials make or change policy decisions as a result of money they

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Albert R. Hunt, *The Best Congress Money Can Buy,* THE WALL STREET JOURNAL, September 7, 1995, p.A15; Celinda Lake & Steve Cobble, *Voters Say Take 'Big Money' Out of Campaigns,* MILWAUKEE JOURNAL SENTINEL, op-ed, April 16, 1995, p.4A; Rodney A. Smith, *White House Auction,* THE WASHINGTON POST, op-ed, April 14, 1995, p.A19; Howard Wilkinson, *No Campaign Money? Keep Your Mouth Shut About It,* THE CINCINNATI ENQUIRER, editorial, November 22, 1998, p.C1; *Political Scandal,* BOSTON GLOBE, editorial, October 31, 1996, p.A26; *Time to Rethink Buckley v. Valeo,* NEW YORK TIMES, editorial, November 12, 1998, p.A22; *Unlimited Cash, Undue Influence,* ST. LOUIS POST-DISPATCH, editorial, July 27, 1998, p.B6.

[4] Princeton Survey Research Associates/Pew Research Center, *Public Opinion Survey* (November 1996) (available at http://www.people-press.org/unionrpt.htm). In this same survey, forty-nine percent of those polled believed the country was "losing ground" in its efforts to fight political corruption.

receive from major contributors."[5] Further, although polls formerly showed that voters trusted their own congressional representatives while decrying corruption in general, even that has changed. An August 1998 poll of voters in eight states showed that between 65% and 75% of voters now believe that campaign contributions affect the votes of *their own* senators on issues of concern to special interests.[6] Over the past two decades, experience has confirmed one of the basic premises of this Court's campaign finance cases: large campaign contributions pose a grave threat to the actual integrity of our government and erode citizens' faith in the honesty of our elected representatives.[7]

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[5] *See* Francis X. Clines, *Most Doubt a Resolve to Change Campaign Finance Reform, Poll Finds*, NEW YORK TIMES, Apr. 9, 1997, at A1.

[6] The Mellman Group, Inc./Public Campaign, *Public Opinion Poll* (August 1998) (available at http://www.publicampaign.org/poll9___3___98.html).

[7] Even under the existing regimes of contribution limits, monied interests can still exert overwhelming influence over the electoral process through practices such as bundling – the coordinated donation of campaign contributions from individuals representing the same corporation, industry or special interest – and other stratagems. *See, e.g.*, Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1140-1142 (1994); Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273, 326-327 (1993) (citing Larry Makinson, Center for Responsive Politics, *Open Secrets: The Encyclopedia of Congressional Money & Politics* (2d ed. 1992)). While contribution limits alone may not be sufficient to assure the integrity of our political processes, they nonetheless remain a necessary element of any regulatory scheme. *Cf. Buckley*, 424 U.S. at 28; *Colorado Republican*, 518 U.S. at 609.

In 1994, the people of Missouri found the threat to the integrity of the state's election process so severe that they overwhelmingly adopted contribution limits far below those passed by the state's General Assembly. Despite this, and despite the debates, hearings, and deliberations conducted by the Missouri legislature, the panel majority below deemed the state's showing of the public perception of corruption insufficient to prove large campaign contributions to be a "real problem". The Eighth Circuit's subversion of controlling precedent and common sense, which threatens to erode further the integrity of our electoral processes, warrants review by this Court.

II. THE EIGHTH CIRCUIT'S COMPLETE LACK OF DEFERENCE TO THE MISSOURI LEGISLATURE IS INCONSISTENT WITH THIS COURT'S CAMPAIGN FINANCE PRECEDENTS AND CASES INVOLVING FEDERAL CONSTITUTIONAL SUPERVISION OF STATE ELECTORAL SYSTEMS.

The panel's application of its new evidentiary standard to the instant case reveals that the burden is impossibly subjective and practically insuperable. The fact that a panel of distinguished jurists can so radically disagree about the adequacy of the state's showing demonstrates that the Eighth Circuit's new standard of review invites members of the judiciary to replace the studied judgment of the people's elected representatives with their own predilections. How many expressions of public dismay will suffice to establish a "real problem" (App. 6a) arising from the public's "imagined coercive influence of large financial contributions", which the *Buckley* Court deemed as threatening to our government's legitimacy as *quid pro*

quo corruption? 424 U.S. at 25-27. How specific and concentrated must the public perception of corruption be to justify a limit of $1,000 instead of $1,200, or $1,201? Where the *Buckley* Court decided the former question as a matter of law, and deemed the latter a task for legislators, the Eighth Circuit has instead unilaterally 'overruled' this Court's common sense judgment and unjustifiably broadened the scope of its judicial review.

As the Petitioners have forcefully argued, the Court of Appeals' decision below will invite a wave of strategic litigation challenging contribution limits throughout the country. *See Nixon v. Shrink Missouri Government PAC*, Petition for Writ of Certiorari, at 16-17 (filed December 14, 1998). Since the proper scope and standard of review is now up in the air, numerous jurisdictions may be required to prove not only that they suffer "a real problem with corruption or a perception thereof as a direct result of large campaign contributions" App. 6a, but also that the specific dollar limits they adopted are narrowly tailored to actually combat corruption and the appearance of corruption while allowing "meaningful participation in protected political speech and association". App. 8a (citing *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995)). If the Eighth Circuit's categorical rejection of the Missouri legislature's studied decision regarding the appropriate level of contribution limits becomes the model for future cases, few if any state limits will withstand such judicial scrutiny.

Under the panel majority's decision, the state legislature is no longer competent to analyze the actual state of affairs in Missouri, despite the fact that its members have actual experience in campaign fundraising and have

studied this issue in depth. Remarkably, the panel majority dismissed the testimony of the person most familiar with the practices and deliberations of the Missouri legislature as "self-serving, given the senator's vested interest in having the courts sustain the law that emerged from his committee". App 7a.[8] This utter lack of deference on matters clearly within legislative competence is inconsistent with this Court's directives in *Buckley* and in other First Amendment cases. As the District Court below recognized, "a court has no scalpel to probe whether, say, a $2,000 ceiling might not serve as well as $1,000." App. 36a (quoting *Buckley*, 424 U.S. at 30). *See also Kentucky Right to Life*, 108 F.3d at 648. If, as a majority of the panel agreed, Missouri's contribution limits are not different "in kind" from those approved in *Buckley* (424 U.S. at 30), the court had no proper basis to substitute its own judgment as to their appropriate level.

Ignoring *Buckley* and two decades of intervening experience, the panel majority rejected as "conclusory" the Missouri legislatures' predictive judgment that, without limits, state government would fall prey to "real

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[8] Under this standard, no court adjudicating the constitutionality of contribution limits should ever entertain a legislator's "description of evidence before the [relevant] Committee, the conclusions drawn by the Committee, [or] . . . fellow legislators' first-hand knowledge of what it costs to wage a campaign and the dangers presented by contributions above the limits enacted". *See* App. 15a, n.6 (Gibson, J., dissenting). Without such testimony, states will have no authoritative way to satisfy the narrow tailoring prong of the Eighth Circuit's test, and judicial scrutiny of even the most reasonable contribution limits will prove fatal every time.

potential to buy votes" as well as the "appearance of buying votes". App. 7a. However, "[s]ound policy making often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1994). *See also Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively"). Similarly, the Eighth Circuit's insistence that Missouri prove the existence of a "real problem" with corruption specifically within its borders[9] does not comport with this Court's First Amendment precedent:

> "Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . or even, in a case applying strict scrutiny, to justify regulations based solely on history, consensus, and 'simple common sense,' *Burson v. Freeman*, 504 U.S. 191 (1992)."

Florida Bar Assoc. v. Went For It, Inc., 515 U.S. 618, 628 (1995). Contrary to these principles, the panel majority announced a new and stringent standard of proof, rejecting the conclusions the Missouri General Assembly (as described by a Campaign Finance Reform Committee

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[9] Contrasting the *Buckley* Court's allusion to "perfidy that had been uncovered in federal campaign financing in 1972", the panel majority refused to infer "that *in Missouri at this time* there is corruption or a perception of corruption". App. 6a (emphasis added).

chair with over thirty years' experience) because they a) did not necessarily reflect the "public perception"; b) were not "objectively 'reasonable' "; and c) were not " 'derived from the magnitude of . . . contributions' that historically have been made to candidates . . . in Missouri". App. 7a (citing *Russell v. Burris*, 146 F.3d 563 (8th Cir.), *cert. denied*, 67 U.S.L.W. 3332 (U.S. Nov. 16, 1998)). Since Missouri, like many states, does not collect and preserve legislative history, one wonders how it could have possibly carried the burden announced by the panel majority.[10] Having determined that Missouri's contribution limits were not different in kind, the Court of Appeals should have recognized the legislature's unique competence to assess the scope of present and future harms posed by large contributions and to adopt limits at appropriate levels.

In First Amendment cases, this Court has recognized the need for some level of deference to the factual determinations of legislators, particularly when future harms must be avoided, complex economic predictions must be made, and disparate interests must be balanced. *See, e.g., Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997) (courts' "sole obligation" is to assure that legislature has drawn "reasonable inferences based on substantial evidence"); *see also CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

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[10] "Judicial deference . . . is based not on the state of the legislative record . . . but 'on due regard for the decision of the body constitutionally appointed to decide' ". *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 646 (1997) (citing *Oregon v. Mitchell*, 400 U.S. 112, 207 (Harlan, J., concurring in part)).

The panel majority's lack of deference is also inconsistent with this Court's precedents in cases concerning the proper scope of federal review for state electoral regulations. These cases are instructive insofar as they announce the basic standard of deference that must be accorded legislatures managing the details of state electoral systems. In the context of state legislative redistricting, the Supreme Court has declined to require states to ensure absolute mathematical equality, but instead has deferred to state legislatures so long as they legislate in good faith within the broad dictates of the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *White v. Register*, 412 U.S. 755, 764 (1973) (9.9% population deviation not a prima facie Equal Protection violation); *Brown v. Thomson*, 462 U.S. 846, 843 (1983) (substantial deference is to be accorded the political decisions of the people of a state acting through their elected representatives, particularly when there is no taint of arbitrariness or discrimination). The Court's deference in this area is notable given the fact that the injury in question, vote dilution, is arguably much more severe and electorally significant than the "marginal restrictions upon the contributor's ability to engage in free communication" occasioned by reasonable contribution limits. 424 U.S. 20-21.

The range of permissible deviation in redistricting cases affords a parallel to the 'difference in kind' doctrine announced in *Buckley*. In both instances, the federal courts have announced the standards of federal law and have allowed state legislatures some flexibility in adopting specific remedial legislation that conforms to local circumstances. Unless the Missouri General Assembly

adopted contribution limits different in kind from those approved in *Buckley*, the Court below had no cause to probe those limits for a violation of constitutional principles.

Sixteen states have adopted contribution limits for statewide offices at or below the level approved in *Buckley*. An additional nineteen states have set limits on roughly the same order of magnitude. App. 42a-44a. The Eighth Circuit decision subjects all of these laws, which are integral to the fair operation of our electoral system, to the likelihood of constitutional challenge. While the federal judiciary must outline the standards of federal law, the determination of the predicate facts that trigger the operation of those standards should be left in significant measure to the sound judgment of state legislatures, which are versed in local experience and charged with the duty of operating honest government. The panel's decision has rendered this duty infinitely more difficult. *Amici* respectfully urge this Court to review the Eighth Circuit's decision.

CONCLUSION

The petition for certiorari should be granted.

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